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IN THE

Supreme Court of the United States

Steven Chortek, Greg Heitz,
Jerry Mason, et. al.,

Petitioners,

v.

City of Milwaukee, Arthur L. Jones and
City of Milwaukee Police Department,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Seventh Circuit affirmed the District Court's granting of summary judgment against the 15 petitioners in this matter. The petitioners in this matter filed a 42 U.S.C. § 1983 claim against the respondents claiming a violation of their Fourth Amendment rights to be free of unreasonable seizures. All of the petitioners were arrested, handcuffed, booked, searched and jailed for an average of about eight (8) hours for selling or attempting to sell a ticket to a sporting event at or less than the face value of the ticket. These arrests were made subject to a Milwaukee Police Departmental order that was in effect over a several week period of time which required officers to arrest and take to jail anyone who was observed selling tickets.

1. Was it an unreasonable seizure under the Fourth Amendment for there to be a police department order and/or policy which did not give the officers on the street discretion and required all individuals who were involved in minor, non-violent ordinance violations such as ticket selling to be arrested and jailed?

2. Was it an unreasonable seizure under the Fourth Amendment to arrest and jail individuals for indeterminate periods of time lasting an average of eight hours for a minor non-violent ordinance violation such as selling tickets to a sporting event and pursuant to *Atwater*, what constitutes an extraordinary seizure under the Fourth Amendment?

LIST OF PARTIES

The petitioners in this matter are Steven Chortek, Greg Heitz, Jerry Mason, Albert Collins, Jerry Sikora, Bradley Keenan, Troy Jensen, Kevin Perlberg, Michael Cullen, Steven Dwyer, Nicolas Imig, Luke Witte, James Klein, Thomas Wade, and Justin Story. The respondents are City of Milwaukee, Arthur L. Jones, and City of Milwaukee Police Department.

CORPORATE DISCLOSURE STATEMENT

None of the petitioners in this matter are corporations. The respondents in this matter are a municipal corporation, a representative of the municipal corporation, and a division of the municipal corporation.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Steven Chortek, et al., v. City of Milwaukee, et al.*, 356 F.3d 740 (7th Cir., 2004). The Seventh Circuit affirmed the January 14, 2003, decision of the United States District Court for the Eastern District of Wisconsin. *See* Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Seventh Circuit's opinion was rendered on January 23, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provision of the Fourth Amendment of the United States Constitution.

Search and Seizure

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Civil action for deprivation of rights.

Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

The main issue presented in this Petition is whether the Fourth Amendment permits a municipality to require its police officers to make warrantless arrests of first-time violators of a given ordinance punishable only by fine. Relying on this Court's five-four decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), permitting

municipalities to arrest first-time violators of municipal ordinances for "fine only" offenses, the Seventh Circuit Court of Appeals found no Fourth Amendment violation where arrest is required rather than permitted. *Steven Chortek, et al. v. City of Milwaukee*, 356 F.3d 740 (7th Cir., 2004).

The Seventh Circuit decision not only conflicts with the decision issued by the Fifth Circuit in *Morgan v. City of DeSoto*, 900 F.2d 811 (5th Cir. 1990), *cert. den.* 498 U.S. 940 (1990), but it conflicts with the very rationale underlying this Court's decision in *Atwater*. In *Atwater*, the Court held that police officers must be given discretion to arrest first-time ordinance violators when deemed appropriate:

> . . . [T]he police routinely make judgments on grounds like risk of immediate repetition; they surely do and should. But there is a world of difference between making that judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest, and making the same judgment when the question is the lawfulness of the warrantless arrest itself. It is the difference between no basis for legal action challenging the discretionary judgment, on the one hand, and the prospect of evidentiary exclusion or (as here) personal §1983 liability for the misapplication of a constitutional standard, on the other. . . .
>
> . . . [W]e confirm today what our prior cases have intimated: The standard of probable cause 'applies to all arrests, without the need

> to balance the interests and circumstances involved in particular situations.' . . . If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender. (emphasis added).

Atwater, 532 U.S. at 350, 354.

In the present case, in order to deter repeat violations of a city of Milwaukee ticket selling ordinance, a police department directive was issued requiring officers to summarily arrest all ticket sellers, regardless of whether the individual was a first-time offender. As a consequence, officers on the scene had no discretion to cite a first-time offender as previously had been the case; without exception, each ticket seller had to be arrested and booked despite the fact that the offense carried no potential jail time.

Not only was the departmental directive broader than necessary to accomplish the avowed purpose for arresting offenders, i.e., to deter second offenses, which could have been served just as easily by arresting those second-time offenders, previously notified that a second offense would result in arrest, but it conflicts with the very reason this Court, in *Atwater*, refused to establish a bright line rule precluding the arrest of fine only ordinance violators, i.e., removing the police officer's ability to exercise his/her discretion to arrest ordinance violators where warranted. It is no more appropriate for a municipality to remove the police officer's discretion to cite ordinance violators as a matter of executive policy, than it would have been for this Court to do so as a matter of

constitutional principle. This was the import of the holding of the Fifth Circuit in *Morgan*, *supra*:

> At 10 p.m. on the night of May 3, 1985, the police force augmented by constables and sheriffs deputies from Dallas County descended on the parking lots and arrested every person who happened to tread that ground that evening. Juveniles were detained in handcuffs only until they could be taken to the local police station, but the culprits who were 17 or older received the full treatment of the criminal justice system: jail and prosecution for criminal trespass. No doubt some of the arrestees had received prior warnings and deserve little sympathy for what happened to them that evening. The same cannot be said for everyone. Take, for example, the girls on the Grand Prairie Softball Team. . . .
>
> This court is unable to understand . . . or to find any justification for the extent of this operation. Regardless of the visibility of the signs, regardless of whether a class B misdemeanor (criminal trespass) was committed, regardless of whether the officers had probable cause to arrest, and regardless of how bad a litter problem the shopping centers were having, we can find no explanation for taking every high school student found on the parking lot under any circumstances and arresting them, handcuffing them, and keeping them in jail for the night as if they were threats to society. Whatever the legal points and the

> liability, how can any party deny that the criminal justice system operated here as an instrument of oppression.

Morgan, 900 F.2d at 812-13, 814.

Petitioners respectfully ask the Court to accept this Petition to reconcile the conflict between the Fifth and Seventh Circuits, and to confirm that the Court's decision in *Atwater* cannot and should not be read to imbue municipalities with *carte blanche* authority to require its officers to arrest all first-time offenders of municipal ordinances punishable only by fine. While this Court has held that the Fourth Amendment permits an officer to exercise reasonable discretion in arresting first-time violators of municipal ordinances for fine only ordinances when deemed appropriate, the Fourth Amendment may not authorize municipalities to deny their officers that exercise of discretion and require them to make arrests, regardless of the situation. The Fourth Amendment may not require a balancing of the governmental interest in arresting a first-time municipal ordinance violator with the rights of the arrestee on a case-by-case basis, but it does not sanction the withdrawal of an officer's discretion to perform such an on-the-scene balancing in making the discretionary determination whether to arrest first-time ordinance violators.

Furthermore, *Atwater* does not sanction the arrest, handcuffing, booking, body searching and jailing of individuals for substantial periods of time for minor fine-only ordinance violations. In *Atwater*, the Court specifically made a point of noting the unobtrusive nature of what happened to Gail Atwater, stating that she was only held in a jail cell, alone, for an hour before she was taken before a magistrate along with noting other facts indicating

that her arrest and jailing was not extraordinary. Contrast that to what happened to the 15 petitioners (and 42 other first-time offenders), who, pursuant to police policy, were arrested, kept in handcuffs for one to two hours, subjected to thorough body searches, put in jail cells with felons, not allowed to make phone calls, and held for an indeterminate period of time averaging about eight hours. Looking at the totality of the circumstances, these were extraordinary seizures and not authorized by *Atwater*.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

There are 15 petitioners in this matter. What they went through is virtually identical one to the other. (See depositions of all the petitioners). The arrest and jailing of two of the petitioners, Michael Cullen and James Klein, is particularly representative of what happened to all of the petitioners.

On February 22, 2001, Michael Cullen went to the Bradley Center to attend the Marquette Golden Eagles basketball game, which was a special night to honor former Marquette basketball coach, Al McGuire. Mr. Cullen's father had two Marquette basketball season tickets and had given them to his son, Michael, because he was unable to go. Michael Cullen had one ticket to sell. Someone asked Michael Cullen if he had any tickets to sell and he sold one of the tickets for $20, which was under the face value of $24 (Cullen Depo, pp. 4-5, 8, 11; Cullen Affidavit).

Approximately five minutes later, a Milwaukee police officer came behind Mr. Cullen, asked for his

identification, and when Mr. Cullen reached for his wallet, the officer put the handcuffs on, restraining his arms behind his back, and told Mr. Cullen he was arrested for scalping. (Cullen depo, pp. 11-12, 14). The metal handcuffs cut into Mr. Cullen's skin causing pain and red marks, which Mr. Cullen characterized as a level five, on a scale of one to ten. When the officer told Mr. Cullen he was under arrest, Mr. Cullen replied "You're kidding", or something to that effect. (Id., pp. 12, 13, 15).

Subsequently, the officer took the still-handcuffed Mr. Cullen and eventually took him to another police car in the parking lot in the back, and because they did not have any leg room in the car, Mr. Cullen had to kneel in the police car. with his hands held behind his back in handcuffs, for over an hour. (Id., pp. 15-17). Mr. Cullen was told by the police, while kneeling handcuffed in the car, that they were waiting for other suspects or scalpers. Also while still kneeling in the police car, with his hands held by handcuffs behind his back, an individual from the Bradley Center came and spoke to Mr. Cullen along with the other individuals in the car, and informed them in an angry tone that they were not welcome back at the Bradley Center. Mr. Cullen felt humiliated being arrested and handcuffed in front of all the people walking into the Bradley Center for the Marquette game. (Id., pp. 17-19).

After being taken down to the city jail, Mr. Cullen was searched, and as a part of that search, he had to put his hands against the wall and the police patted him down. The police made him take off his jacket and empty his pockets, looked into his ears and mouth, took off his shoelaces, took all his change, his wallet, his phone and his belt, and then conducted a very thorough body search. (Id., pp. 35-36). Mr. Cullen was then placed in a jail holding cell with other individuals who were being held for serious crimes. While

in the jail holding cell, Mr. Cullen, who had never been arrested in his life, was asked by an individual in the jail holding cell about the consequences for carrying bullets. (Id., pp. 33-34). Mr. Cullen felt afraid while in the jail holding cell, and one of the individuals who caused him to be afraid was later determined to have been arrested and convicted for first degree murder and sentenced to life in prison. (Cullen Affidavit).

Mr. Cullen requested to make a phone call while in police custody, but was not allowed to make one. His wife had been looking for him and wondered where he was; he did not arrive home until approximately 1:30 in the morning, and the game time was 7:00 in the evening, and she had not heard from him during that period of time. (Cullen depo., p. 31). Mr. Cullen was in custody in the Milwaukee jail for approximately six and one-half hours. (Id., p. 35).

At the time of his arrest and jailing, James Klein was 65 years old and was a chemical engineer at a construction firm in Milwaukee. (Klein depo., pp. 4, 64). Mr. Klein and his company had been Milwaukee Bucks' season ticketholders for approximately 30 years. On the night of his arrest and jailing, he was attempting to sell, for less than face value, some of the four seasons tickets that he had. On that night, the police approached Mr. Klein and asked him to show the contents of his pockets, which he did, and then the police handcuffed him with his arms behind his back. While he was being led off by the police, Mr. Klein asked what this was all about, because he was very surprised as to what was happening. The handcuffs were causing him pain because they were very tight. (Id., pp. 16-17, 21). Mr. Klein was handcuffed with his hands behind his back for approximately two hours. (Id., p. 22).

While being held in the paddy wagon in handcuffs, he and the others in the paddy wagon were informed by the police driver that the decision to arrest and jail everyone who was selling tickets came down from the top. The police officer further stated that they were trying to make an example of the people arrested for ticket selling by summarily arresting and taking them to jail instead of issuing a ticket and that they would be held in the paddy wagon for a while, then taken to the jail and processed, and then held for a period of time. (Id., pp. 76-86). While in the paddy wagon, Mr. Klein and others were given a speech by a representative of the Bradley Center indicating that they were no longer welcome at the Bradley Center ever again, and if recognized, they would be arrested. (Id., pp. 29-30).

Mr. Klein believed that since he was not aware of the ordinance and that he had witnessed over the years open ticket selling, that a simple warning or citation would have been adequate and that the arrest, and the whole episode including the jailing, was totally out of line. (Id., p. 32). Mr. Klein had been going to the Bradley Center for numerous events since its opening and knew that it was commonplace to see individuals selling tickets, and believed that this was an acceptable practice. (Id., pp. 36-37).

After being held in the police van for a significant period of time, Mr. Klein and others were transported to the city jail and placed in a processing line there, remaining in handcuffs during the entire process. (Id., p. 41). Mr. Klein essentially went through the same processing, including the full body search that Mr. Cullen and other petitioners were put through. Mr. Klein asked and was denied permission by the police to make a phone call during the entire time in custody and confinement. (Id., p. 42). Mr. Klein asked the

arresting officer what was taking so much time for his release from confinement, and he was told that if he was smart with the officer, he would be held an additional three hours. (Id., p. 45).

Mr. Klein was especially distressed that he was confined because his wife expected him home shortly after the game and he was not able to contact her to let her know that he was not coming home because he was not allowed to make a phone call. (Id., p. 48). After his release, Mr. Klein discovered that his wife was trying to reach him on his cell phone. When he picked up the cell phone to call home after his release, he noticed that there were several messages on the cell phone from his wife. The first message was at about 11:30 p.m. and his wife was upset and wondering where he was and why she had not heard from him. The next message on the phone was at about 1:00 a.m., and his wife had a totally different tone, one of concern and worry. The next message was at approximately 3:00 a.m., and his wife sounded panicky. (Id., pp. 90-91).

Mr. Klein tried to call home after his release, but his wife was not there. As he discovered when he got home that, at about 3:00 a.m., his wife had gone to a neighbor, and the neighbor ended up driving Mrs. Klein to Mr. Klein's office to see if he was there, and that is what she was doing when Mr. Klein arrived home at about 4:30 a.m. to find her not there. (Id., pp. 90-91; Judith Klein Affidavit). After she came home, Mrs. Klein told her husband that she thought he had had a heart attack, or that something serious had happened. She could come up with no other explanation as to why she had not heard from him for numerous hours after the end of the game. Mrs. Klein was up essentially all night worrying about her husband. (Klein depo., p. 92; Judith Klein Affidavit). Mr. Klein was

in police custody and detention from approximately 6:00 p.m. until approximately 4:00 a.m., approximately 10 hours. (Id., p. 12)

This whole situation whereby individuals were arrested, handcuffed, searched and jailed for numerous hours for selling a ticket originated in January of 2001. At that time, representatives of the Bradley Center contacted the Milwaukee Police Department to request assistance for problems they were having with hardcore scalpers who were supposedly bothering fans coming to games. (Sperling Affidavit). Lieutenant Edman of the Police Department, in charge of the local police district, advised the Bradley Center representatives that they could arrest these individuals and take them to processing at the jail in order to address the problem. (Edman depo., p. 39; Sperling Affidavit). The Bradley Center's main concern was the problem with hardcore scalpers or "regulars" and expressed this concern to the police at meetings they had prior to the operation's starting. (Bartlett depo., pp. 18-19; Costello depo., pp. 12, 14). Based on their prior experience with these hardcore scalpers, it was relatively easy for both the Milwaukee Police Department and the Bradley Center representatives to identify who the "regular" hardcore scalpers were, and who the individuals who were just trying to unload tickets for the first time. (Bartlett depo., pp. 18-19; Edman depo., p. 39).

Prior to starting this operation in January of 2001, Lieutenant Edman received authorization from Deputy Chief Barber, head of the Patrol Division, and part of the authorization allowed for undercover officers on the scene. (Edman depo, p. 12; Alexander depo., pp. 5, 8, 22, 54). One of the requirements of Deputy Chief Barber for authorization of this operation was that Lieutenant Edman give him daily reports, each time there was a game, as to

what had transpired, which Lieutenant Edman did by email. Additionally, Deputy Chief Barber required a report as to what the problem was at the Bradley Center, which Lieutenant Edman prepared and forwarded to Deputy Chief Barber on January 15, 2001. (Edman depo., pp. 13, 14; Sperling Affidavit).

The decision was made by Lieutenant Edman and Deputy Chief Barber that individuals selling tickets at the Bradley Center would be summarily arrested and taken down to the city jail regardless of whether or not they were first time offenders or "regular" ticket sellers. (Edman depo., p. 38; Alexander depo., pp. 5, 8, 22, 54). The police were aware that there was a group of people at the Bradley Center who were buying and selling tickets as a business, but they did not focus on those individuals who were causing the problems, but instead came up with a plan to arrest and jail everyone including first time ticket sellers, season ticketholders and other individuals who were simply trying to unload a ticket on a one-time basis, for less than face value. (Edman depo., pp. 39-42). As the general manager of the Bradley Center indicated, it was neither the intent nor the desire of the Bradley Center to arrest, detain, process and jail individuals who were average fans who were just trying to unload a ticket. (Sperling Affidavit; Costello memorandum). Lieutenant Edman, with authorization from Deputy Chief Barber, issued a sweeping order that all individuals who were observed offering to sell tickets at the Bradley Center were to be summarily arrested and taken to jail, even though the potential violations were civil and did not carry potential jail time. (Alexander depo., pp. 5, 8, 22, 54). The officers on the scene had no discretion, but were required to arrest and take to jail any individuals for selling tickets as opposed to citing them, as had normally been done previously. (Ruege depo., p. 12; Alexander depo., p. 52).

It was recognized by Steven Costello, General Manager of the Bradley Center, that ticket selling activity had grown substantially over the previous few years, resulting in an atmosphere that tended to reinforce to an average fan with an extra ticket or two that it was perfectly acceptable to "unload" their tickets on the premises. (Sperling Affidavit – Costello memorandum). It was also recognized by Mr. Costello, during this operation, that the Police Department's efforts "netted some regular fans, both season and non-season ticket holders, naively trying to unload a ticket or two and that these fans had been shocked by the treatment for what most would consider something to be a crime no more serious than jaywalking." (Sperling Affidavit – Costello memorandum).

Because of such treatment of regular fans, the Bradley Center requested, and the Milwaukee Police Department agreed about six weeks after the operation had been in effect, to modify its policy for first-time ticket sellers so as to only issue them citations and then release them, as opposed to arresting them and taking them to jail. (Sperling Affidavit – Costello memorandum; Edman depo., p. 58). As of March 6, 2001, a report from Lieutenant Edman to his superior indicated that of the people arrested for ticket selling during this initiative, 57 were first-time ticket sellers and 13 were repeaters. (Sperling Affidavit – Edman report). In response to a hypothetical, Lieutenant Edman testified at his deposition that departmental policy gave him authority to issue a directive that all jaywalkers be summarily arrested and taken to jail. (Edman depo., pp. 54-55).

It was the policy of the Milwaukee Police Department at the time of the dates in question, and is still the policy of the Milwaukee Police Department, that a departmental order can be made to summarily arrest and jail

any individual who commits any ordinance violation (such as ticket selling, parking tickets, jaywalking, or speeding), and that such an order can stay in effect over a certain period of time. (Chief Jones depo., p. 35; Alexander depo., pp. 18, 19).

It is Milwaukee Police Department policy and practice, and was at the times and dates in question, that if an individual is summarily arrested and taken to jail for municipal ordinance violations, said individual has to be maintained in handcuffs with his arms behind his back, for the period of time that he is in the police vehicle and while waiting in line at the jail to be "booked". (Ruege depo., pp. 29-30; Homa depo., p. 32).

It was Milwaukee Police Department policy and practice that anyone summarily arrested for municipal ordinance violations is to have his or her person thoroughly searched, including, but not limited to, having to put both hands against the wall and spread their legs, remove their belt, loosen their pants, and have an officer go up the inseam to the crotch area and run their fingers through the belt area, also look into their mouth, ears, along with other parts of their bodies. (Alexander depo., pp. 39, 42; Belmore depo., pp. 18, 19). It was also the policy of the Milwaukee Police Department that anyone summarily arrested for any municipal ordinance violation also has all of their personal possessions taken from them, including having their wallet thoroughly searched, wedding rings taken, shoes removed, socks checked, pockets emptied, cash taken from them, and searches of their personal property. (Belmore depo., pp. 18, 19).

It was the Milwaukee Police Department policy that individuals arrested for municipal ordinance violations are placed in the same jail holding cells with individuals who

are charged with felonies, including murder. (Wroblewski depo., p. 6). It was Milwaukee Police Department policy that once the individual is at the Milwaukee city jail that all individuals are treated the same, whether they are there for municipal ordinance violations or for violent felonies. (Id., p. 10). It was also the general policy of the Milwaukee Police Department that when individuals are being held in the jail holding cells for municipal ordinance violations, no phone calls are allowed, even to wives or other close relatives. (Belmore depo., p. 38).

It was the Milwaukee Police Department policy that people arrested and held in the jail for municipal ordinance violations are held for an indeterminate period of time with no specific time limit and the length of the detention and jailing depends on the circumstances, including but not limited to, the amount of staff on hand, how busy the jail is that night, and who the arresting officer is that night. (Chief Jones depo., p. 29).

B. PROCEEDINGS BELOW

A complaint was filed in this matter on March 28, 2001. An answer was filed by the respondents on April 20, 2001. An amended complaint was filed, adding various plaintiffs, on June 29, 2001. An amended answer was filed by the respondents on August 2, 2001. Discovery ensued with numerous depositions being taken, as well as substantial amounts of documents being produced. On April 2, 2002, the respondents filed a Motion for Summary Judgment, which was briefed and responded to by the petitioners on June 7, 2002. On January 14, 2003, an Order was signed by District Court Judge J. P. Stadtmueller, granting the respondents' Motion for Summary Judgment.

On February 6, 2003, the petitioners filed their Notice of Appeal. Briefs were filed and the case was argued on September 9, 2003. On January 23, 2004, the Seventh Circuit affirmed the Order for Summary Judgment of the District Court.

REASONS FOR ALLOWANCE OF THE WRIT

In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Court stated that there was a "dearth of horribles" regarding arrests and jailing for minor violations. What *Atwater* has spawned and what we have seen in Milwaukee is a "parade of horribles", with the City of Milwaukee Police Department taking *Atwater* to the extreme and issuing departmental orders taking all discretion away from police officers and requiring them to arrest and jail all individuals who were observed attempting to sell tickets. This operation lasted for approximately a six week period of time. This Petition for a Writ of Certiorari should be granted to determine the reach of *Atwater* and clarify if *Atwater* sanctions departmental orders requiring the arrest and jailing of individuals for minor, non-violent ordinance violations and the jailing of such individuals for numerous hours.

Review also should be granted because the case at bar conflicts with the Fifth Circuit case of *Morgan v. City of DeSoto*, *supra*, as discussed above.

The Petition should also be granted to determine if *Atwater* permits the arrest and jailing of individuals for any type of ordinance violation regardless of how insignificant, such as failure to keep your sidewalks clean, playing baseball after hours, not having the appropriate license stickers on your bicycle, spitting in a public place, and the

like and what constitutes an extraordinary seizure under the Fourth Amendment.

I. REVIEW IS WARRANTED BECAUSE THE COURT NEEDS TO DETERMINE WHETHER *ATWATER* APPLIES TO POLICE DEPARTMENT ORDERS THAT REMOVE ALL DISCRETION FROM OFFICERS AND REQUIRES ARREST AND JAILING FOR MINOR ORDINANCE VIOLATIONS.

The lower court cites *Atwater*, *supra,* in support of its opinion that it was reasonable to arrest and jail the petitioners for the ticket selling ordinance violation. There are, however, significant differences between the case at bar and the *Atwater* case. In *Atwater*, an officer arrested and took to jail a woman for not having her children in seatbelts. She was placed in a jail cell, alone, for an hour before she was taken before a judge and released. This particular officer had an encounter with Atwater previously and during the stop and officer was angered by the interaction between the two of them. Atwater did not have to go through a body search, nor was there much in the way of processing. The Supreme Court found that Atwater's arrest was:

> no more harmful '... to privacy or... physical interests' than the normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station where police officers asked her to remove her shoes, jewelry, and glasses and to empty her pockets. They took her photograph, and placed her in a cell, alone, for about an hour after which she was taken before a magistrate, and released on $310.00 bond.

> The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment. 121 S. Ct. 1558.

Contrast that with what happened to the petitioners as described above, which was substantially more harmful to their privacy and physical interests than the normal custodial arrest. The fact that most of them were held in handcuffs with their arms behind their backs and kept in a paddy wagon for about an hour before being taken to the jail, the fact that they all went through thorough body searches, and the fact of their numerous hours being kept in a jail holding cell with other individuals charged with serious crimes shows the substantial differences between what happened to *Atwater* and the petitioners.

Probably the most significant difference between *Atwater* and the case at hand is that in *Atwater*, the Court was concerned with not second guessing an officer making a judgment call on the street and allowing the officer to have discretion as to whether to arrest or cite someone depending on the circumstances. The *Atwater* Court, in fact, stated that if it only came down to the reasonableness balancing analysis under the Fourth Amendment that Atwater would have prevailed, but because the Court did not want to take away discretion from the officer on the street, it ruled against Atwater. In the case at hand, there was an order from the highest reaches of the department, authorized by Deputy Chief Barber, head of the patrol division, mandating all officers to summarily arrest and convey to the jail all individuals who were observed selling tickets. (App. Ex. A: Alexander depo., pp. 5,8, 21-22.) The officers had no discretion whatsoever, and were not given the option to give citations as would usually have been

done in the past. (Def. App. Ex. I: Ruege depo., p. 12; App. Ex. A: Alexander depo., p.22.)

The Supreme Court in *Atwater* noted that there was "a dearth of horribles" regarding individuals arrested and jailed nationally for minor fine only violations. However, in our case, there was essentially a sweep of all individuals selling tickets by arresting and jailing almost all of them. As of March 26, 2001, it was noted in a report by Lieutenant Edman that 57 first time ticket sellers had been arrested. Thus, 57 individuals, including petitioners, who had never been cited or charged with selling tickets previously were arrested and jailed for substantial periods of time. (App. Ex. D: Sperling Affidavit -Edman Reports of February 23, 2001 and March 26, 2001.)

Chief Jones testified that departmental policy permitted Lieutenant Edman to order that for a period of weeks anyone who was selling tickets at the Bradley Center must be arrested and jailed. (Defendant. App. Ex. E: Jones depo., pp. 35-38.) One can imagine that in *Atwater*, if the City of Lago Vista police had issued a sweeping departmental order that all individuals who did not have their children in seatbelts were to be arrested and jailed, the Court would have found in Atwater's favor because one of the main reasons for the Court's decision was the Court's view that the individual officers should have discretion on the scene as to whether or not to arrest. Under that scenario, or the one in the case at bar, it is likely that the Court would not have found a "dearth of horribles".

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT BETWEEN THE FIFTH CIRCUIT AND THE SEVENTH CIRCUIT AS TO THE REASONABLENESS OF SWEEPING ORDERS TO ARREST ALL INDIVIDUALS FOR MINOR VIOLATIONS.

The case of *Morgan v. City of Desoto, supra,* is instructive as to the reasonableness of a sweeping order to arrest all individuals for a minor violation. In that case, high school students filed a § 1983 action due to the fact that they were caught up in a sweep in a shopping center parking lot and were arrested, handcuffed and jailed for most of the night for trespassing. The police had decided to perform such an operation due to the fact that teenagers were congregating in shopping center parking lots causing substantial litter problems. That Court held that summary judgment for the city and the officers was improper.

Morgan applies to the case at hand. Regardless of whether the officers had probable cause to arrest, regardless of how bad the ticket selling problem that the Bradley Center was having, there is no reasonable explanation for taking every person who was selling tickets on the Bradley Center premises and arresting them, handcuffing them and keeping them in jail for most of the night as if they were threats to society. Like in *Morgan*, there was massive overreaching by the police that violated the petitioners' Fourth Amendment rights and constituted an even more egregious violation of privacy interests than in *Atwater*.

III. REVIEW IS NECESSARY TO CLARIFY AS TO WHAT CONSTITUTES AN EXTRAORDINARY ARREST AND WHETHER THE ARREST, HANDCUFFING, BOOKING AND JAILING OF THE PETITIONERS FOR THE MINOR ORDINANCE VIOLATION WAS EXTRAORDINARY.

The lower courts erred in finding that the arrest and jailing of the petitioners was not conducted in an extraordinary manner. In *Atwater* and in *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996), the Supreme Court indicated that where there were searches or seizures conducted in an extraordinary manner, unusually harmful to an individuals privacy or physical interests, even if there is probable cause for the arrest, the Court would still find Fourth Amendment violations. "[T]he question whether a search or seizure is 'extraordinary' turns, above all else, on the manner in which the search or seizure is executed." *Atwater* 121 S. Ct. 1558. Setting forth cases in which there was probable cause but where the searches and seizures were extraordinary, the Court cited *Tennessee v. Garner*, 471 U.S. 1105 (1985), *Wilson v. Arkansas*, 514 U.S. 927 (1995) (an unannounced entry into a home), *Winston v. Lee* 470 U.S. 753 (1985) (physical penetration of the body) and *Welsh v. Wisconsin* 466 U.S. 740 (1980) (entry into a home without a warrant).

Welsh is particularly instructive. In that case, the police had probable cause to believe that an individual, who was driving drunk, had left the scene and went into his house. The police then went into his house without a warrant and arrested him for driving under the influence of an intoxicant. The Court decided that the Fourth Amendment prohibits the police from making a warrantless entry into a person's home in order to arrest him for a non-

jailable traffic offense. In determining whether the application of the exigent-circumstance exception in the context of home entry should apply, the Court stated that such an exception should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. The Court further noted that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor. The Court quoted Justice Jackson in *McDonald v. United States,* 335 U.S. 451 (1948), where Justice Jackson explained why a finding of exigent-circumstances to justify a warrantless home entry should be severely restricted when only a minor offense has been committed,

> Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses involving no violence or threat of it. While the enterprise of parting fools from their money by the 'numbers lottery' is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures.

466 U.S. 750-751 (emphasis added).

The police in this case also displayed a shocking lack of all sense of proportion by unreasonably seizing the petitioners

and arresting, booking, and jailing as well as holding them incommunicado, for an extremely minor ordinance violation that did not involve any potential for harm. The lack of proportion is even more shocking in our case, in that the arrests and jailings were part of an order that stated that this would happen to everybody who was involved in this minor ordinance violation. One of the lessons of *Welsh* is that the severity of the offense matters in making a determination as to reasonableness under the Fourth Amendment even if there is probable cause.

It is evident that what the police did in our case was even more extraordinary than what was done in *Welsh*. *Welsh* concerned a drunk diving offense, an offense much more serious than attempting to unload an extra ticket. Furthermore, *Welsh* concerned entry into a home, whereas our case concerns the seizure of persons. Much Fourth Amendment case law concerns the sanctity of one's home and preventing the police from unreasonably searching one's home. However, it is clear that the sanctity of one's person is equally or even more important.

IV. REVIEW IS NECESSARY TO DETERMINE WHETHER *ATWATER* AND OTHER CASE LAW PERMITS A POLICE POLICY THAT INDIVIDUALS CAN BE ARRESTED AND JAILED FOR SUBSTANTIAL PERIODS OF TIME FOR ANY VIOLATION, NO MATTER HOW INSIGNIFICANT.

In the case at bar, the police policy that allowed for arrests, handcuffing, booking, searching and jailing for an substantial periods of time for minor ordinance violations was a primary cause of the petitioners' Fourth Amendment rights being violated. Because the police policy was that these individuals could be held for essentially unlimited

amounts of time depending on the circumstances, that policy is a major factor in causing the unreasonable seizures of the petitioners, especially in the context of a non-violent minor ordinance violation. The American Law Institute has recommended a two-hour maximum for detentions absent special circumstances (American Law Institute Model Code of Pre-Arraignment Procedure Sec. 130.2(1) (1975)). The recommendations of the American Law Institute were also cited with favor in *Atwater*. It should be noted that these recommendations were made for individuals held on criminal charges. Certainly, a much stronger case can be made for a time limit such as two hours in cases involving minor non-violent ordinance violations. In any event, in the context of these types of violations, this Court needs to set parameters along the lines set forth by the American Law Institute limiting the amount of time that an individual can be detained for minor ordinance violations.

This policy of unlimited detention periods needs to be seen in conjunction with the other policy of the Milwaukee Police Department which states that anyone can be arrested and jailed for any municipal violation no matter how minor. This policy leads to absolutely absurd results. The following is a list of a number of Milwaukee City Ordinances:

	Milw. Ordinance
Domestic Animals in Parks	(Sec. 63 - 19)
Feeding Birds	(Sec. 78 - 35)
Littering on Public Property	(Sec. 79 - 11)
Regulation of Compost Piles	(Sec. 79 - 125)
Sidewalks to be Kept Clean	(Sec. 79 - 13)
Separation of Recycle Materials	(Sec. 79 - 14)
Spitting in Public Places	(Sec. 80 - 15)
Sale of Unwashed Rags	(Sec. 80 - 22)
Breeding Place for Flies	(Sec. 80 - 31)

Parking Permit On-Street Daytime	(Sec. 81 - 86)
Sale of Milk and Cream in Bottles	(Sec. 82 - 16)
Sale of Fruits and Berries	(Sec. 82 - 12)
Sale of Firewood	(Sec. 82 - 16)
License Stickers for Bikes and Snowmobiles	(Sec. 102 - 2)
Equipment on Bicycles	(Sec. 102 - 10)
Bicycle Riding Permitted on Certain Sidewalks	(Sec. 102 - 14)
Icicles on Buildings	(Sec. 105 - 16)
Skateboarding Restricted	(Sec. 105 - 19)
Basketball, Baseball, and Softball Regulations	(Sec. 105 - 21)
Exhibiting Stud Horse or Bull	(Sec. 106 - 6)
Unlawful Library Acts	(Sec. 106 - 21)
Abandonment of Shopping Carts	(Sec. 110 - 36)

Consequently, pursuant to police policy, if one violates any of the above minor ordinances, that individual can be arrested, handcuffed, booked and jailed for an indeterminate period of time depending on the circumstances at the jail. (Chief Jones depo., pp. 13, 27.) This allows the police to do something that a judge is not able to do nor has the legislature allowed; that is, put someone in jail for indeterminate periods of time for ordinance violations. This puts us all at the mercy of the police, even our teenage children, like in *Morgan*, *supra*, or older citizens such as petitioner, James Klein, who was 65 years old. One slight misstep as to any of the above ordinances or others not listed, provides the basis for being arrested and jailed for indeterminate periods of time.

Even if a police officer mistakenly believes that an individual has violated an ordinance, but still has probable cause, that individual can be arrested and jailed for

numerous hours (even though the offense carries no potential jail time) and not vindicated until his future court date. However, the damage has already been done because that person has had to go through being arrested, handcuffed, booked, body-searched, and jailed.

These policies are compounded by the additional policy that allows supervisors in the Milwaukee Police Department to issue sweeping orders to arrest and jail individuals for minor ordinance violations such as ticket selling, taking away all discretion from the officer on the street. As Lieutenant Alexander acknowledged, a police supervisor could order that anyone who commits a parking violation in the city be arrested and jailed. (App. Ex. A: Alexander depo., p. 19.) These policies create scenarios whereby police power is essentially unlimited and unchecked and is repugnant to the principles of a free society.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant this Petition for Review.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 03-1329

STEVEN CHORTEK, GREG HEITZ,
JERRY MASON, et al.,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE, ARTHUR L. JONES and
CITY OF MILWAUKEE POLICE DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 01 C 323—**J.P. Stadtmueller**, *Judge.*

ARGUED SEPTEMBER 9, 2003—DECIDED JANUARY 23, 2004

Before CUDAHY, EASTERBROOK and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Fifteen plaintiffs brought this action under 42 U.S.C. § 1983 against the City of Milwaukee ("the City"), the Milwaukee Police Department ("the MPD"), and the police chief. The plaintiffs alleged that the defendants had violated their constitutional rights when the plaintiffs were arrested for selling tickets in the vicinity of the Bradley Center, Milwaukee's sports and entertainment

arena. The defendants moved for summary judgment. After a hearing, the district court granted the motion and dismissed the plaintiffs' claims. The plaintiffs appeal. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

Milwaukee city ordinances prohibit a "direct seller" from "engag[ing] in direct sales on any public way or other public premises," Milw. Mun. Ord. 95-1, and prohibit anyone from "sell[ing] or offer[ing] to sell" tickets on a public street or sidewalk within five hundred feet of the Bradley Center during the time between two hours before and one hour immediately after any scheduled event, *id.* 105-56(2)(b). The penalty for violation of either of these ordinances is a fine plus the costs of prosecution. *See id.* 95-1(12), 105-56(3). The plaintiffs were arrested for allegedly violating these ordinances.

1. Bradley Center Initiative[1]

In January 2001, the Milwaukee Police Department received complaints from the Bradley Center regarding ticket scalpers who bothered arriving fans. Bradley Center representatives believed that the number of regular ticket scalpers was increasing and found that they were unable to

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[1] The initiative is also described in this court's recent opinion in *Arlotta v. Bradley Center*, No. 03-1584, slip op. (7th Cir. Nov. 18, 2003).

handle the problem on their own. In response, the MPD launched an initiative that called for police to arrest and jail every person observed selling tickets in violation of the ordinances. The initiative was designed as an undercover operation. A plainclothes officer who observed a violation would call a uniformed officer, identify the offender and then confirm that the uniformed officer arrested the appropriate individual.

Those arrested were taken to a police vehicle behind the Bradley Center until one-half hour after game time. During that time, a representative from the Bradley Center read a prepared "Notice of Violation and Prohibition from Property" speech. The notice informed those arrested that they were no longer welcome at the Bradley Center and that they would be charged with trespassing if they returned. After the Bradley Center speech, those arrested were taken to the Prisoner Processing Section ("PPS") at the police administration building for booking, processing, citations and release.

Lieutenant Gary Edman, with the approval of Deputy Chief Leslie Barber, made the decision to arrest summarily all offenders, regardless of whether they were "first-time" offenders or "regular" ticket sellers. Lieutenant Edman later testified that on-the-scene citations had been ineffective in deterring violations of the ordinances: "[P]eople were given tickets, released on the scene, and they continued engaging in scalping tickets. And again, they were involved with harassing the fans coming into the Bradley Center." R.27, Ex.F at 37-38. Lieutenant Edman explained: "[T]hat's when we decided to take a more affirmative action as it relates to arresting and detaining people violating the scalping ordinance." *Id.* at 38. Chief Arthur Jones testified that summary arrest procedures are appropriate under certain circumstances, depending in part on "the

number of people we're going to take into custody, the conduct that they're engaged in, and the potential for them to return and engage in that same conduct—or I mean not return, never leave." *Id.*, Ex.E at 20. MPD policy permitted the summary arrest of individuals who committed ordinance violations when, in the discretion of the officer, arrest was necessary. Additionally, MPD policy permitted supervisors to implement a summary arrest procedure for a class of ordinance violations if the supervisor deemed summary arrests to be appropriate for that class of violations. The Bradley Center initiative, as designed by Lieutenant Edman and approved by Deputy Chief Barber, fell within the confines of these MPD policies.

Because the Bradley Center fell within the jurisdiction of Police District 1, those arrested as part of the Bradley Center initiative were subject to the standard processing routine at PPS. Processing at PPS involved a series of procedures related to booking, searches, paperwork and release. After arriving at PPS, the arrestees waited fifteen minutes to one-half hour to have their name, charges and other information entered into the police blotter. An officer then prepared an order for detention, and the arrestee entered the booking room. In the booking room, the arrestee removed outerwear, which was inventoried, and submitted to a thorough search. The arrestee then completed a medical-screening form. After the search, police placed the arrestee in a gender-specific holding cell while the paperwork was completed. Although PPS officers performed the search and other booking procedures, the arresting officer had to remain present.

The arresting officer also had to fill out and complete an arrest and detention report (the "ADR"). The ADR required the arresting officer to receive a "want" package, which is a computer teletype processed by the Bureau of

Identification. The "want package" lists local, extended state and national outstanding warrants, as well as an individual's criminal record. Processing time for the "want" package typically varies and depends upon the number of requests made to the Bureau of Identification at that time. The ADR usually requires about one-half hour to complete, but it can take longer when an officer arrests more than one person at the same time.

After the shift commander approved the completed ADR, the arrestee was issued a citation. The citations required "a fairly lengthy supplemental narrative on the back." *Id.*, Ex.G at 12. Once a PPS sergeant reviewed the paperwork, the arrestee received his belongings and was released. Supervisors at PPS monitored the progress of the booking process. The length of the processing time was affected by the total number of people being processed at PPS as well as by the number of people for which the arresting officer was responsible. Although efforts were made to expedite processing, the paperwork was "extensive" and "easily" required six to eight hours to complete. *Id.*, Ex.I at 31-33.

2. Arrests and Booking of the Plaintiffs

The fifteen plaintiffs were among the individuals arrested as part of the Bradley Center initiative for selling tickets in violation of the Milwaukee municipal ordinances. The plaintiffs were detained at PPS from approximately three to fourteen and one-half hours while the administrative processing steps were completed. They underwent the procedures previously described. With one exception, the plaintiffs were not allowed to make phone calls during

their detention. With one exception, they were released between 11:00 p.m. and 4:00 a.m.[2]

The plaintiffs underwent certain treatment they found objectionable. For example, some report that they were required to kneel in the police car, that they were humiliated at being arrested in front of people going to the game, that they were afraid in the holding cell because of other prisoners, and that they suffered anxiety knowing spouses would be concerned about their whereabouts. One testified that he was threatened by an officer with lengthier detention for asking what was taking so much time.

B. District Court Proceedings

The district court granted summary judgment to the defendants. On its own motion, the court denied class certification to the arrestees. It also dismissed claims against the MPD as a non-suable entity under § 1983. On the merits of the arrestees' claims, the district court held that the Eighth and Fourteenth Amendments did not apply. Although the Fourth Amendment applied, the district court found as a matter of law that it was not violated because arrests can be made for ordinance violations; police did not conduct the arrests and detentions in an extraordinary manner; and the lengths of the plaintiffs' detentions were reasonable.

The plaintiffs timely appeal the district court's entry of summary judgment on the Fourth Amendment claims.

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[2] One of the plaintiffs held an out-of-state driver's license and had to follow additional processing procedures. He was detained for a total of approximately twenty-one hours but only for fourteen and one-half hours at PPS, until 9:30 a.m.

II

DISCUSSION

A. Standard of Review

We review de novo a grant of summary judgment. *See Dykema v. Skoumal*, 261 F.3d 701, 704 (7th Cir. 2001). We view all facts and draw all inferences in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is appropriate when there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

B. Reasonableness of the Initial Arrests

The plaintiffs submit that their arrests for selling tickets in violation of the Milwaukee municipal ordinances were unconstitutional. Under Wisconsin Statute § 968.07(1)(d), a law enforcement officer may arrest when "there are reasonable grounds to believe that the person is committing or has committed a crime." The plaintiffs do not dispute that the arresting officers had probable cause to believe they violated Milwaukee Municipal Ordinances 95-1 and 105-56(2)(b).

Arrest for a minor, non-jailable offense does not violate the Fourth Amendment. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). When officers have probable cause to believe that an individual has committed an offense in their presence, they may arrest the offender. *See id.* In *Atwater*, a mother was arrested for the misdemeanor offenses of failing to wear and failing to have her children wear seatbelts. *See id.* at 323. The Supreme Court held that the Fourth Amendment did not prohibit arrest for these offenses. *See id.* at 354. *Atwater* makes clear that even non-

violent misdemeanor offenses, such as unauthorized ticket sales, can support an arrest under the Fourth Amendment as long as the officer had probable cause to believe the offense had been committed.

The Court in *Atwater* noted, however, that individualized review may be appropriate "when a defendant makes a colorable argument that an arrest, with or without a warrant, was 'conducted in an extraordinary manner, unusually harmful to [his] privacy or even physical interests.' " *Id.* at 352-53 (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)). The Court then determined that the petitioner's arrest may have been "humiliating," but it was no more harmful to her privacy or physical interests "than the normal custodial arrest." *Id.* at 354. Similarly, in *Whren*, the Court noted that the traffic stop at issue did not "remotely qualify" as an extraordinary search or seizure. *Whren*, 517 U.S. at 818. When probable cause exists, only searches or seizures conducted in an extraordinary manner require a "balancing" analysis. *Id.*

The plaintiffs argue that individualized review is appropriate in their case given the minor nature of the offense. Particularly, they contend that they faced "much worse" treatment than did the plaintiff in *Atwater*. The differences, they emphasize, relate primarily to the length of time spent handcuffed in a police vehicle, the thoroughness of the body searches, their inability to make phone calls and the fact that they had to share a holding cell with other prisoners rather than being placed in holding cells alone. We cannot say, however, that this treatment is "unusually harmful" to physical interests or privacy. *Cf. Whren*, 517 U.S. at 818 (listing examples of extraordinary searches and seizures as "seizure by means of deadly force . . . unannounced entry into a home . . . entry into a home without a warrant . . . or physical penetration of the body" (internal

citations omitted)). Indeed, the plaintiffs' situation was quite similar to that of the petitioner in *Atwater*: The arrests may have been "humiliating," but they were no more harmful "than the normal custodial arrest." *Atwater*, 532 U.S. at 354.

C. Reasonableness of the Detentions

After being taken into custody, the plaintiffs waited for some time to be transported to PPS. They were then detained at PPS between three and fourteen and one-half hours. All but one of the plaintiffs was detained over four hours. Twelve of the fifteen were detained over six hours. Six were detained over eight hours. The plaintiffs complain that the length of these detentions was constitutionally unreasonable.

1. Length of the Detentions

An excessive length of detention may be sufficient to violate the reasonableness requirement of the Fourth Amendment. The Supreme Court held in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that an officer's "on-the-scene assessment of probable cause" justifies an arrest and "a brief period of detention to take the administrative steps incident to arrest." *Id.* at 113-14. The Court also held that individuals arrested without a warrant are entitled to a timely and judicial determination of probable cause prior to "extended restraint of liberty following arrest." *Id.* at 114; *see also id.* at 126. The Court left unspecified in *Gerstein* just how "promptly" a probable cause determination had to be made, *see id.* at 125, but in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court clarified that a determination of probable cause within forty-eight hours is presumptively

reasonable, *see id.* at 56. In the case of detentions over forty-eight hours, the government bears the burden of proving an emergency or other extraordinary circumstance which justifies the delay. *Id.* at 57.

County of Riverside is generally invoked to evaluate cases involving extended detention because the forty-eight hour framework governs the length of time which may elapse before a probable cause hearing. *See, e.g., Kyle v. Patterson*, 196 F.3d 695, 696 (7th Cir. 1999); *United States v. Sholola*, 124 F.3d 803, 819-21 (7th Cir. 1997). Here, neither extended detention of the plaintiffs nor probable cause hearings were contemplated. Rather, police held the plaintiffs only while they completed their processing. *County of Riverside* is relevant to this discussion, nonetheless, because the Court noted in *County of Riverside* that unreasonable delays, even within the forty-eight hour period, may be constitutionally troublesome. *See County of Riverside*, 500 U.S. at 56. The Court specified: "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* Thus, under *Gerstein* and *County of Riverside*, the length of time taken to complete administrative steps incident to arrest must be reasonable.

This court has addressed previously the reasonableness of the length of detention during administrative steps. In *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985), we required defendants to explain why individuals spent more than four hours in jail after they were arrested in the middle of the night for a minor offense. *See id.* at 1350-51. Similarly, in *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986), an individual was arrested for shoplifting and detained for four hours in the middle of the night. *See id.* at 437. As to the length of detention, we noted:

> It is premature to say how long is too long under the fourth amendment. On remand the police should explain what must be done after an arrest for shoplifting and why reasonably diligent officers need more than four hours to do it. The court also should determine whether four hours is an acceptable period for a nonviolent misdemeanor.

Id. We also suggested that "[i]f the police choose to perform time-consuming tasks after an arrest, perhaps they must do so on their own time rather than the suspect's, issuing a citation rather than keeping the suspect locked up in the interim." *Id.* We later stated that the reasonableness of a length of detention typically "is a question best left open for juries to answer based on the facts presented in each case." *Lewis v. O'Grady*, 853 F.2d 1366, 1370 (7th Cir. 1988) (holding that an eleven-hour detention of individual waiting to be discharged presented a jury question).

All but one of these plaintiffs was held for longer than four hours at PPS. Many were held substantially longer than four hours. Under *Moore* and *Gramenos*, we require an explanation for the length of the plaintiffs' detentions. *See also Arlotta v. Bradley Center*, No. 03-1584, slip op. at 11 (7th Cir. Nov. 18, 2003) (evaluating government's explanation of the length of detention of an individual arrested as part of the Bradley Center initiative).

The defendants explain the length of the detention as a product of backlog. They note that PPS is the processing facility for the downtown area, that PPS is busiest in late evening to early morning and that the arrest of large groups can cause a backlog at PPS. The defendants also note that supervisors monitored the progress of the booking process and that arresting officers processed the paperwork as quickly as they could, given the number of arrestees for which each was responsible and the number

of arrestees at PPS. The plaintiffs, on the other hand, have not argued that the detention times were the result of "delay for delay's sake," *County of Riverside*, 500 U.S. at 56, or for any other impermissible reason.[3] They merely assert that the times were unreasonably long.

The detention times of the plaintiffs, on average, were significantly longer than the four-hour periods which gave us pause in *Moore* and *Gramenos* and which another panel of this court evaluated in *Arlotta*. Nonetheless, in the absence of any evidence of improper purpose for the delay, we believe the government has provided a sufficient explanation. *Cf. Gramenos*, 797 F.2d at 436-37 (noting lack of evidence of time required to complete tasks and evidence of punitive intent); *Moore*, 754 F.2d at 1350-51 (noting absence of *any* evidence justifying length of detention). The Supreme Court cautioned in *County of Riverside* that, in evaluating the reasonableness of delay, "courts must allow a substantial degree of flexibility." *County of Riverside*, 500 U.S. at 56. The Court warned:

> Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to an-

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[3] We have reviewed the record carefully and have discovered no evidence that the plaintiffs were held for any improper purpose. *See Gramenos v. Jewel Cos., Inc.*, 797 F.2d 432, 436 (7th Cir. 1986) (noting additional evidence that police held individual "out of spite—or perhaps to impose the real punishment for shoplifting"). Although Lieutenant Edman described the initiative as a "more affirmative action," R.27, Ex.F at 38, that statement must be considered in the context of the perceived ineffectiveness of citations given on the scene. Alone, the comment does not provide evidence of improper purpose. Furthermore, the plaintiffs have not argued that police held them out of spite or with intent to punish.

> other, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Id. at 56-57. The Court issued this warning in reference to determinations about the reasonableness of delay in probable cause determinations, but the circumspection the Court advises applies to this situation as well. We must conclude, therefore, that the length of the plaintiffs' detentions was not constitutionally unreasonable given the natural backlog in processing at PPS.

2. Municipal Liability

Even had the length of the detentions warranted a jury determination of reasonableness, the plaintiffs could not succeed on their § 1983 claim against the City.[4] The Supreme Court determined in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that a government entity is only liable under § 1983 when execution of a government policy or custom "by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" inflicts the injury of which the plaintiff complains. *Id.* at

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[4] The plaintiffs also have sued Chief Jones but have not specified whether they are bringing their claims against him in his official capacity or his individual capacity. There is no evidence that Chief Jones was personally involved in the arrests of the plaintiffs or the development of the Bradley Center initiative. We consider the suit against him, therefore, to be in his official capacity. Claims against Chief Jones in his official capacity suit are effectively claims against the City. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

694; *see Henry v. Farmer City State Bank*, 808 F.2d 1228, 1237 (7th Cir. 1986) (noting that plaintiffs must prove that their injury "was caused by an official municipal policy or custom"); *see also Arlotta*, slip op. at 8 ("To state a § 1983 claim against a municipality, a complaint must allege that a constitutional deprivation was caused by an official policy or custom."). We do not believe the plaintiffs can establish that the length of their detentions was caused by an "official policy or custom."

Our case law establishes that unconstitutional policies or customs take three forms: (1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice, that, although unauthorized, is so permanent and well-settled that it constitutes a "custom or usage" with the force of law; or (3) an allegation that a person with final policymaking authority caused the injury. *See Rasche v. Vill. of Beecher*, 336 F.3d 588, 597 (7th Cir. 2003). The plaintiffs attempt to proceed under the first method by establishing an express policy. Only those individuals with the requisite policymaking authority are capable of establishing "official policy" as required by *Monell*. *See Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1324-25 (7th Cir. 1993).

The plaintiffs argue that the Bradley Center initiative constituted a policy upon which to predicate § 1983 liability. They contend that the decision to arrest summarily all offenders, combined with the standard processing procedures at PPS, led to constitutional injury. We cannot agree with these contentions.[5]

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[5] We note that, in *Arlotta*, another case involving claims of a plaintiff arrested as part of the Bradley Center initiative, another (continued...)

The record indicates that Lieutenant Edman developed the Bradley Center initiative with the approval of Deputy Chief Barber.[6] The discretionary decisions of an employee without policymaking authority are insufficient to establish § 1983 liability. *See McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 510 (7th Cir. 1993); *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality) (discussing insufficiency of decisions by subordinate municipal employees without final decisionmaking authority); *Fiorenzo v. Nolan*, 965 F.2d

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[5] (...continued)
panel of this court determined that the plaintiff could not establish a § 1983 claim under *Monell* because causation between the alleged policy and the injury was lacking. *Arlotta*, slip op. at 10. Because our colleagues found causation to be absent, they did not specifically address whether the Bradley Center initiative qualified as an "official policy" under *Monell*. Our analysis does not disturb the reasoning in *Arlotta*.

[6] It is true that a departmental policy permitted the arrest and detention of fine-only offenders, but our focus must be on the more particularized decision to arrest ticket scalpers and subject them to the routine at issue. That particular decision was the alleged source of injury and provides the appropriate level of meaningful specificity. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1984) (plurality) ("[S]ome limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* [*v. Department of Social Services*, 436 U.S. 658 (1978),] will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal policy can be identified behind almost any such harm inflicted by a municipal official . . . ."); *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-82 (1986) ("The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.").

348, 351 (7th Cir. 1992) ("[A] municipality is not liable merely because the official who inflicted the alleged constitutional injury had the discretion to act on its behalf; rather, the official in question must possess final authority to establish municipal policy with respect to the challenged action."). Whether the lieutenant or the deputy chief had the authority to set official policy is a question of state law. *See Horwitz v. Bd. of Educ. of Avoca Sch. Dist. No. 37*, 260 F.3d 602, 619 (7th Cir. 2001); *see also Praprotnik*, 485 U.S. at 124 (plurality). There is no indication that these officers had policymaking authority; rather, the police chief is charged with the command and rule-making responsibilities for the police department under Wisconsin law. *See* Wis. Stat. § 62.09(7)(c) & (13)(a); *see also Monfils v. Taylor*, 165 F.3d 511, 517-18 (7th Cir. 1998) (refusing to find municipal liability based on the acts of a Wisconsin deputy chief when evidence did not establish ratification by the police chief). There is no evidence that Chief Jones was involved in the development of the Bradley Center initiative.[7] Without the involvement of a policymaker, the decisions of subordinate employees do not suffice to establish municipal liability. Thus, the plaintiffs cannot succeed on their § 1983 claim against the City.

Conclusion

Because the plaintiffs' arrests and detentions did not violate the Fourth Amendment and because the plaintiffs cannot establish an official policy or custom, the district court correctly entered summary judgment in favor of the

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[7] As noted, any claim against Chief Jones in his individual capacity would also fail for this reason.

defendants on the plaintiffs' § 1983 claims. We affirm the decision of the district court.

AFFIRMED

CUDAHY, *Circuit Judge*, concurring. Although one may doubt some of the reasons advanced by the City for the prolonged period of detention here, there is enough evidence (but barely) to support the majority's conclusion that the explanation of the detention's length was reasonable. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991) (cautioning reviewing courts to allow "a substantial degree of flexibility" in determining reasonableness because delay caused by administrative tasks is often unavoidable). However, the majority touches upon a question (not raised here by the plaintiffs) that remains something of a mystery since *Atwater v. City of Lago Vista* had very little to say explicitly about it: to what extent, if any, is the validity of an arrest and detention for a fine-only offense affected by the purpose or motive of the arresting officer? The *Atwater* court frequently cited *Whren v. United States*, 517 U.S. 806 (1996), as relevant here, and *Whren*, of course, established that motive or purpose was not relevant to the validity of a traffic stop. Perhaps, this is a signal that they are equally irrelevant here. In addition, the *Atwater* court dismissed the need for a case-specific balancing test in determining the reasonableness of an arrest unless it is "conducted in an extraordinary manner, unusually harmful to [his] privacy or even physical interests." *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001), quoting *Whren*, 517 U.S. at 818.

On the other hand, the majority opinion suggests that "punishing" an individual by arresting and detaining him is not a proper purpose for engaging in those procedures (citing our pre-*Atwater* decision in *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 436-37 (7th Cir. 1986), in which we noted that there was "some evidence that the police held Gramenos out of spite—or perhaps to impose the real punishment for shoplifting"). Yet the entire sequence here involved a scheme to deter repeat offenders for whom the mandated punishment—a citation and a fine—was not sufficient. This could constitute a punishment by ordinary definitions of the term.[1] *See Ewing v. California*, 538 U.S. 11 ___, 155 L. Ed. 2d 108, 120, 126 (2003) (noting that purposes of criminal punishment are "deterrence, incapacitation, retribution and rehabilitation").

However, as indicated earlier, this issue has not been raised or litigated (and perhaps, in light of *Atwater*, it is not an issue), so it does not present a barrier to summary judgment.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[1] *See, e.g.*, Appellants' Br. at 5, citing Deposition of James Klein at 45 ("Mr. Klein asked the arresting officer what was taking so much time for his release from confinement, and he was told that if he was smart with the officer, he would be held an additional three hours.").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

U.S. DIST. COURT EAST DIST. WISC
FILED

JAN 14 2003

AT _____ O'CLOCK _____M
SOFRON B. NEDILSKY

STEVEN CHORTEK, GREG HEITZ, JERRY MASON, ALBERT COLLINS, JERRY SIKORA, BRADLEY KEENAN, TROY JENSEN, KEVIN PERLBERG, MICHAEL CULLEN, STEVEN DWYER, NICOLAS IMIG, LUKE WITTE, JAMES KLEIN, THOMAS WADE, and JUSTIN STORY,

Plaintiffs,

v. Case No. 01-C-323

CITY OF MILWAUKEE, BRADLEY CENTER SPORTS AND ENTERTAINMENT CORPORATION[1], CITY OF MILWAUKEE POLICE DEPARTMENT, and ARTHUR JONES.

Defendants.

[1]On March 8, 2002, the Bradley Center Sports and Entertainment Corporation was dismissed from this action upon a stipulation from the parties.

ORDER

The named plaintiffs filed this class action lawsuit in an amended complaint against the named defendants. Each of the plaintiffs was arrested and jailed by the Milwaukee police for violating city ordinances prohibiting ticket sales without a permit and within 500 feet of the Bradley Center sports facility located in downtown Milwaukee. The arrests occurred on various evenings in January and February of 2001, and each of the plaintiffs was arrested, handcuffed, detained in a police vehicle, booked, searched, detained in jail, issued citations, and released. They each remained in police custody for approximately nine hours with the exception of plaintiff Jerry Mason, who had an out-of-state driver's license and was detained for approximately twenty-one hours.

The plaintiffs allege their arrests and detentions violated their constitutional rights and they seek relief rom the defendants pursuant to 42 U.S.C. § 1983. They allege the defendants subjected them to unreasonable searches and seizures in violation of the Fourth and Fourteenth Amendments, cruel and unusual punishment in violation of the Eighth and fourteenth Amendments, violated their due process rights under the Fourteen Amendment, and denied them equal protection under the law in violation of the Fourteenth Amendment. They further allege Milwaukee Chief of Police Arthur Jones deprived them of their constitutional rights through the administration of improper and negligent policies and procedures of the Milwaukee Police Department (MPD), and the MPD combined and conspired with the Bradley Center to deprive the plaintiffs of their constitutional rights by subjecting them to abusive, excessive, and unreasonable police conduct and jailing.

The defendants have filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56(c) to which the plaintiffs have responded. The matter has been full briefed and the court will now address the defendants' motion.

FACTUAL BACKGROUND

A "direct seller" cannot "engage in direct sales on any public way or other public premises" in the City of Milwaukee without a permit. Milw. Mun. Ord. 95-1. No person may "sell or offer to sell" tickets on any public street or sidewalk within 500 feet of the Bradley Center "for a period of time beginning two hours immediately before the commencement of any scheduled event and ending one hour immediately after the conclusion of the event." Milw. Mun. Ord. 105-56(2)(b).

In January of 2001, the MPD launched an initiative aimed at curbing illegal ticket sales in front of the Bradley Center by arresting an jailing every person observed selling tickets in violation of these two ordinances. They initiative called for officers to arrive in front of the Bradley Center about one hour before game time and stay until about a half-hour after the game began. If the plainclothes officer observed an ordinance violation, the arrestee would be arrested, handcuffed, and taken to a police vehicle parked in back of the Bradley Center. The arrestee would remain in the vehicle until about one half-hour after game time. While the arrestee was in the police vehicle, a representative from the Bradley Center would enter the vehicle and give a rehearsed speech called the "Notice of Violation and Prohibition From Property," which informed arrestees they were not welcome at the Bradley Center in the future and would be charged with trespassing if they returned. The police vehicle would then transport the arrestees to the police administration building where they

would be booked, processed, issued citations, and released. Lieutenant Gary Edman of the MPD who led the initiative chose to arrest and jail all persons observed illegally selling tickets because in the past the police found issuing citations did not deter illegal ticket selling. Lieutenant Edman stated in his deposition:

> We found [issuing citations] to be ineffective. What we found out was that people were given tickets, released on the scene, and they continued engaging in scalping tickets. And again, they were involved with harassing the fans coming to the Bradley Center. And that's when we decided to take a more affirmative action as it relates to arresting and detaining people for violating the scalping ordinance.

(Edman, Dep., at 37-38.)

The MPD permits its officers to arrest and jail persons for municipal violations. Pursuant to MPD procedure, any person arrested in the vicinity of the Bradley Center, which is locate in Police District one, must be taken to the Prisoner Processing Section (PPS) located on the fifth floor of the police administration building at 749 West State Street in Milwaukee for processing. The arrestee remains in police custody at the PPS until the police have completed the paperwork incident to the arrest. The MPD policy regarding the length of time an arrestee may be held in custody for processing relative to an ordinance violation is whatever time is reasonable, depending on the circumstances. The amount of time an arrestee is detained is typically affected by the number of arrestees to be processed and the number of officers available to process each arrestee. The PPS is busiest during late evening and

early morning and becomes backlogged when groups of arrestees arrive at the same time.

The following is a brief description of the processing steps which take place at the PPS. The arrestee is lined up against a wall and waits anywhere from 15 minutes to 1 and ½ hours to have his name, the charges filed against him, and any other relevant information recorded in the police blotter. The information in the blotter is later entered into a booking database, and an order for a detention is prepared by the arresting officer or conveying officer which is time-stamped at the time the arrestee enters the booking room. Once in the booking room, the arrestee is asked to remove all outer clothing, which is inventoried, leaving on only one outer garment. The arrestee is then thoroughly searched for contraband and any other item the arrestee could us to injure himself or others while in the holding cell. Also at some point during the booking process, the arresting or conveying officer fills out a medical intake screening report which is designed to log relevant medical history of the arrestee and to verify the arrestee si not ill or injured. It takes about 10 to 15 minutes to complete the medical intake screening report.

After the arrestee is booked and searched, he is placed in a gender-specific holding cell while the arresting officer completes the arrest and detention report (ADR). The officer in charge of the PPS is made aware of the number of arrestees at the facility and is informed of what charges are made against each arrestee. The officer in charge continues to monitor the progress of the arrestees and makes sure the arresting officers are working on their reports.

Before the arresting officer can complete the ADR, he must first receive a "want" package which consists of a

computer teletype listing any local wants, extended state wants, national wants, and a person's criminal record. The length of time required to receive want packages depends on the number of requests being handled by the Bureau of Identification; although, "priority" requests may supercede other requests.

Once an officer receives a "want" package, he can complete the ADR. The ADR must be completed by the arresting officer before the arrestee may be released from the PPS. The ADR is a two-sided report which consists of the date and time of arrest, the names of the officers involved in the arrest, the nature and description of the offense, personal data and identification information regarding the subject, method of time of conveyance of the arrestee, the arrestee's property register, and the time the want package was completed. The ADR takes about a half-hour to an hour to complete, but it can take longer when multiple individuals are arrested by the same officer.

The arrestee is released once the arresting officer hand-delivers the ADR to the shift commander for review and signature. The arrestee is taken from the holding cell and issued a citation, which the arresting officer has already prepared. The arrestee then fingerprints the back of the citation and is placed back in the holding cell until the PPS sergeant reviews the paperwork. After the PPS sergeant reviews the paperwork, the arrestee is taken to the property room, receives his belongings, and, if it is after business hours, escorted out of the building.

A recitation of the facts concerning the arrest and detention of each plaintiff is not necessary. Police officers observed each plaintiff selling or offering to sell tickets without a permit and within 500 feet of the Bradley Center within two hours of the event. Each plaintiff was arrested,

handcuffed, detained on the scene in a police vehicle, taken to the PPS between 7:00 p.m. and 8:30 p.m., booked, searched, placed in a male-only cell, and issued citations for selling tickets without a permit and within 500 feet of the Bradley Center. With the exception of plaintiff Heitz, the police refused to let the plaintiffs make phone calls during the course of their detentions. The plaintiffs were released between 11:00 p.m. and 4:00 a.m. and were detained at the PPS anywhere from six to nine hours, with the exception of plaintiff Mason.

The length of each plaintiff's detention (excepting Mason) generally corresponds with the number of arrestees who arrived at the PPS along with the plaintiff. To illustrate, plaintiffs Chortek, Heitz, Sikora, Keenan, Jensen, Perlberg, Dwyer, Klein, and Story each arrived at the PPS along with seven other arrestees, and each was detained at the PPS for about eight hours. Plaintiffs Imig and Witte each arrived at the PPS along with five other arrestees, and each was detained at the PPS a little over six hours. Plaintiff Collins arrived at the PPS along with four other arrestees, and he was detained at the PPS for about five hours. Plaintiff Wade arrived at the PPS along with two other arrestees, and he was detained at the PPS for about three hours. The sole exception to this trend is plaintiff Cullen, who arrived at the PPS with one other arrestee but was detained for five hours.

The plaintiffs did not suffer any permanent injuries, lost wages, or earning capacity as a result of the defendants' actions, and they do not allege they sustained any physical or emotional injuries requiring treatment from healthcare providers. In addition, the plaintiffs do not make any claims for medical treatment expenses or future medical treatment.

STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Venue in this court is proper since the events giving rise to the plaintiffs' claims occurred in the Eastern District of Wisconsin within the meaning of 28 U.S.C. § 1391(b). Summary judgment pursuant to Red. R. Civ. P. 56(c) is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) mandates summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the part's case and which the party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact is raised only if the evidence is such "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The mere existence of some alleged factual dispute between parties will not defeat an otherwise property supported motion for summary judgment provided there is no genuine issue of material fact. *Anderson*, 477 U.S. at 247-48.

DISCUSSION

Before reaching the merits of the defendants' motion for summary judgment, the court will address whether certification of the plaintiffs' proposed class action is proper under Fed. R. Civ. P. 23. The plaintiffs have not filed a motion for certification; however, a fair reading of Fed. R. Civ. P. 23(c) suggest the court has an obligation to determine on its own whether a class should be certified.

Id. (stating "the court shall determine by order whether" a class action "is to be maintained"). Therefore, the court will consider whether this action should be maintained as a class action, but it will not generate arguments on behalf of the plaintiffs to support certification. *See Trotter v. Klincar*, 748 F.2d 1177, 1185 n.10 (7th Cir. 1984).

In their complaint, the plaintiffs propose the class be made up of "all persons who were detained, arrested, handcuffed, and transported by City of Milwaukee police officers to the City of Milwaukee jail in connection with the actions, policies and procedures taken by the defendants to prevent people from selling tickets at the Bradley Center and who had not engaged in regular and repeated sales of tickets for events at the Bradley Center." The plaintiffs have the burden of demonstrating the certification of the class is appropriate. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). The court will conduct a two-step analysis to determine whether class certification is appropriate. First, the plaintiffs must satisfy all four requirements of Rule 23(a), which are numerosity, commonality, typicality, and adequacy of representation. *Harriston v. Chicago Tribute Co.*, 996 F.2d 697, 703 (7h Cir. 1993). Second, the plaintiffs must satisfy one of the conditions of Rule 23(b). *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977).

Although the court finds the plaintiffs satisfy the four requirements of Rule 23(a), the court will not certify the plaintiffs' class because they do not satisfy the requirements of Rule 23(b). In their complaint, the plaintiffs seek to certify their class under Rule 23(b)(1) which allows for certification when

> the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which wold establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matters be dispositive of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(A) and (B). If the court certifies the plaintiffs' class under Rule 23(b)(1), the members of the class will not have an opportunity to opt out of the class and any judgment of this court will be binding upon them. *Williams v. Balcor Pension Investors*, No. 90C726, 1991 U.S. Dist. LEXIS 8513, at *7 (N.D. Ill. June 25, 1991). To meet the burden for certification under Rule 23 (b)(1)(A), the plaintiffs must show there is "the possibility that inconsistent adjudications would subject the defendants to truly incompatible standards of conduct." *Id.* at *9. In other words, the plaintiffs must show other such actions have actually been brought or there is a likelihood such actions will be brought. *Id.*. To meet the burden for certification under Rule 23(b)(1)(B), the plaintiffs must show "an individual action will inescapably alter the substance of the rights of others having similar claims." *Wyman v. Connecticut Gen. Life Ins. Co.*, No. 86C9595, 1990 U.S. Dist. LEXIS 18762, at *56 (N.D. Ill. Sept. 26, 1990).

Here, the plaintiffs do not support certification beyond language in their complaint which simply paraphrases the text of Rule 23(b)(1). Consequently, they fail to show there is a real risk of separate actions being filed which would result in inconsistent adjudications under Rule 23(b)(1)(A) or the filing of an individual action would "inescapably alter" the rights of others having similar claims under Rule 23(b)(1)(B). Without such a showing the court cannot conclude certification of the plaintiffs' class, which would preclude other class members from seeking individual relief outside of the class, is proper in this case. *See Trotter*, 748 F.2d at 1185 n.10 (a party seeking certification cannot be heard to complain" when the court refuses to certify a class based on a complaint containing "only sketchy and conclusory allegations merely track[ing] the language of Rule 23. . . ."). Accordingly, the court declines to certify the plaintiffs' class action.

The court now addresses the merits of the defendants' motion. The defendants initially assert the MPD is not a suable entity under § 1983 because it is a subdivision of the City of Milwaukee. The plaintiffs do not challenge this assertion, and the court agrees the MPD should be dismissed asa party to this lawsuit. *See, e.g., Baltzer v. City of Sun Prairie/Police Dep't*, 725 F. Supplemental. 1008, 1020 n.14 (W.D. Wis. 1989).

The remaining defendants argue they are entitled to summary judgment since the plaintiffs cannot demonstrate the defendants' actions deprived them of their constitutional rights. The court agrees. First, the plaintiff cannot demonstrate the defendants violated their rights under the Eighth Amendment, since the Eighth Amendment only applies to convicted prisoners–not pretrial detainees. *See Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998). Second, the plaintiffs cannot demonstrate the

defendants violated their rights under the equal protection clause of the Fourteenth Amendment since they do not demonstrate the defendants engaged in an "invidious discrimination in statutory classifications and other governmental activities." *Harris v. McRae*, 448 U.S. 297, 322 (1980). Third, the plaintiffs cannot demonstrate the defendants violated their rights under the due process clause of the Fourteenth Amendment since the due process clause only "regulates the period of confinement after the initial determination of probable cause." *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir. 1992). Here, the plaintiffs were released prior to any probable cause determination.

Finally, although the Fourth Amendment does apply to the plaintiffs' claims, *see Villanova*, 972 F.2d at 797 (the Fourth Amendment "governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made"), the plaintiffs cannot demonstrate the defendants violated their Fourth Amendment rights since the police had probable cause to arrest them, the fourth Amendment permits arrests for ordinance violations, the lengths of the plaintiffs' detentions were reasonable, and the plaintiffs' arrests and detentions were not conducted in an extraordinary manner.

First, the police had probable cause to arrest the plaintiffs. A warrantless arrest by a police officer must be supported by probable cause. *United States v. Navarro*, 90 F.3d 1245, 1254 (7th Cir. 1996). Police officers have probable cause to make an arrest when at the time of the arrest, the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person to believe an offense was committed. *Simkunas v. Tardi*, 930 F.2d 1287,

1291 (7th Cir. 1991). In a § 1983 action for false arrest, probable cause need not exist for the charge for which the plaintiff was arrested so long as probable cause existed for arrest on a closely related charge. *Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993).

The plaintiffs argue there was no probable cause for their arrests under Milwaukee Ordinance 95-1[2], the ordinance involving direct sellers permits, since they were not "direct sellers" under the ordinance but were at most "transient sellers." The court cannot agree. "Direct sellers" are defined under the ordinance as "persons who sell goods" such as "peddlers and solicitors." Milw. Mun. Ord. 95-1(2)(c). The court believes a reasonably competent person in the officer's position could have concluded a person selling or offering to sell tickets at the Bradley Center was acting as a direct seller within the meaning of 95-1. On the other hand, the court does not believe a reasonably prudent person in the officer's position could conclude a person selling or offering to sell tickets fits the definition of a "transient merchant" which is defined as a "person who engages in the business of purchasing or selling of merchandise at any fixed price in the city temporarily." Milw. Mun. Ord. 95-1-(2)(k). People do not sell their tickets before a game at fixed prices; they negotiate the price and take what they can get before the game starts. In addition, it is too much of a stretch to say

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[2]Milwaukee Municipal Ordinance 95-1 reads in relevant part:

> No direct seller may engage in direct sales on any public way or other public premises in this city without having obtained a license under this section.

Id.

selling a couple of extra tickets before a game is engaging in the "business of . . . selling merchandise." *Id.*. Accordingly, the police had probable cause to arrest the plaintiffs for violating Milw. Mun. Ord. 95-1.

Second, the Fourth Amendment permits the police to make full custodial arrests for ordinance violations, punishable only by a fine, if the violation is committed in the presence of an officer. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *McNair v. Coffey*, 279 F.3d 463, 466 (7th Cir. 2002). The plaintiffs argue looking at the totality of the circumstances, it was unreasonable for the police to arrest them. The plaintiffs' argument has no merit. The police made custodial arrests of the plaintiffs only after observing them commit a violation of the ticket-selling ordinances. Nothing more was required for a lawful arrest under the Fourth Amendment.

Third, the lengths of the plaintiffs' detentions were reasonable under the Fourth Amendment since the police only detained the plaintiffs as long as was necessary to complete the administrative steps incident to arrest, and the delays in the plaintiffs' detentions were caused by overcrowding at the PPS and the limited number of officers on hand to process arrestees. As part of any custodial arrest, the police may detain an arrestee for a brief period of time to complete the administrative steps incident to arrest. *See Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1979). And in light of *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), it is clear to this court the police were permitted to subject the plaintiffs to the same administrative septs incident to arrest as person arrested for jailable offenses so long as each of the administrative steps were generally applicable to all arrestees. In *Atwater*, the Supreme Court held the severity of an arrestable offense had no bearing on the constitutionality of a detention to complete the

administrative steps incident to arrest under the Fourth Amendment. 532 U.S. at 352-53. The Court reasoned any restrictive safeguards concerning the lengths of detentions for minor offenses, such as giving a suspect "a prompt opportunity to request release," were better derived from State laws rather than "broad" constitutional principles:

> It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle. it is, in fact, only natural that States should resort to this sort of legislative regulation, for . . . it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason.

Id. at 532. At the same time, the court thinks it would be improper for the police to subject every arrestee to an administrative step which is so specific to a certain type of offense that its general application could not be justified. For example, in *Hood v. City of Chicago*, 927 F.2d 312 (7th Cir. 1991), the Seventh Circuit held an administrative step which required a fingerprint check for every person arrested for certain misdemeanors which could be upgraded to felonies could not be generally applied to all arrestees. *Id.* at 314-15. The court concluded such an administrative step would have little or no relevance to a person whose offense could not be upgraded. *Id.* at 315.

Here, each of the administrative septs the police subjected the plaintiffs to at the PPS were generally

applicable and justifiably applied.[3] Unlike in *Hood*, where the administrative stop for fingerprinting was tailored to upgradable misdemeanors, the "want" packages prepared at the PPS have nothing to do with the severity of an offense; rather, their purpose is to determine whether arrestees are currently wanted for other crimes, which may include violent felonies. Since it is impossible to determine whether an arrestee is wanted for a crime simply by looking at the arrestable offense, the police are justified in running "want" packages on all arrestees. Moreover, administrative steps such as booking, searching, and completing ADRs are not offense-specific; rather, these steps generally apply to all persons in police custody to ensure there is an adequate record of th detention and the detention is safe.

Even though the police were permitted to subject the plaintiffs to each of the administrative steps at the PPS the Fourth Amendment still requires the detention for the purpose be "brief." *Gerstein*, 420 U.S. at 113-14. The Seventh Circuit has not adopted a "bright-line" test to establish at what point warrantless detention to take the administrative steps incident to arrest ceases to be brief; rather, it has analyzed on a case-by-case basis "whether the period of detention is reasonable in light of all the circumstances accompanying the detainee's arrest, including transportation, booking, filing, photographing,

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[3]The court notes plaintiff Jerry Mason was subjected to slightly different administrative steps than the rest of the plaintiffs since he was the only plaintiff who had an out-of-state drivers license and was consequently considered a flight risk. After his paperwork incident to arrest was completed at the PPS, he was held overnight and then transferred to the Milwaukee County Criminal Justice Facility the following morning where he was ultimately released at 3:15 p.m. since the plaintiffs' response brief does not address the legality of Mason's detention beyond his processing at the PPS, the court does not address it.

fingerprinting, identify verification, and criminal "wanted" checks, as well as the number of individuals to be processed with the detainee in question." *Patrick v. Jasper County*, 901 F.2d 561, 567 (7th Cir. 1990). And while no hard and fast rule exists concerning when a detention ceases to be brief, the Seventh Circuit has indicated "a detention of more than four hours, while not necessarily unconstitutional, requires 'an explanation.'" *Lewis v. O'Grady*, 853 F.2d 1366, 1370 (7th Cir. 1988) (citing *Moore v. Marketplace Restaurant, Inc* 754 F.2d 1336, 1351 (7th Cir. 1985); *Gramenos v. Jewel Companies, Inc.*, 797 F.3d 432, 437 (7th Cir. 1986)).

The courts have long recognized "the regular problems confronting police when processing arrestees through the overcrowded criminal justice system may give rise to delays that are not deemed to violate the Fourth Amendment." *Willis v. City of Chicago*, 999 F.2d 284, 287 (7th Cir. 1993). As the Seventh Circuit explained:

> Some delays are unavoidable because of the practical realities of the criminal justice system. 'Transporting arrested persons from one facility to another, handling latenight bookings where no magistrate is readily available, [and] obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest' are all examples of situations in which delays . . . are reasonable.

Willis, 999 F.2d at 288 (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991)). As such, the court will allow for a substantial degree of flexibility when determining whether the police's explanation for a

detention beyond four hours is reasonable. *See county of Riverside v. McLaughlin*, 500 U.S. 44, 46 (1991). If the police provide a legitimate explanation, and that explanation is not disputed by the plaintiffs, the matter may be disposed of on summary judgment. *See Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1351-52 (7th Cir. 1985).

The defendants offer testimony to show they detained the plaintiffs only as long as was necessary to complete the administrative steps incident to arrest, and the lengths of the plaintiffs' detentions were extended beyond four hours due to overcrowding at the PPS and the limited number of officers on hand to process arrestees. Police officers who manage the PPS testified in their depositions they constantly supervise the arresting officers to make sure they are working on the paperwork incident to arrest to ensure arrestees are released as soon as possible. The officers who arrested and processed the plaintiffs testified in their depositions they completed the plaintiffs' paperwork as quickly as they could, taking breaks only for dinner and working overtime when necessary. In every instance, the arresting officers did not end their shifts until they completed the plaintiffs' processing.

The plaintiffs do not challenge the explanation offered by the police, and they essentially concede their detentions went beyond four hours due to overcrowding and limited manpower. Nonetheless, they allege the PPS was inexcusably understaffed since the ticket-selling initiative was preplanned. The court cannot agree. In an ideal world, there would be limitless officers on hand to swiftly process any arrestee who enters the PPS, but officer shortages are one of the practical realities of any police force which services a large city. And while it took the police longer to process the plaintiffs than they would have

liked, each of the plaintiffs (excepting Mason) was ultimately released by early morning and was detained during normal working hours. Assigning more officers to the PPS may have had the effect of speeding up the plaintiffs' detention time, but the reallocation of officers for that purpose would necessarily take those officers away from other tasks such as patrolling crime-ridden neighborhoods. These personnel decisions, which require a practical assessment of law enforcement needs balanced against limited economic resources, are better suited to policymakers who have intimate knowledge of these matters than an isolated federal court. Moreover, the demands of federalism require this court to give proper deference to the defendants' decision about where to assign its police officers; otherwise, States would lose the flexibility to design and experiment with different ways to meet law enforcement needs–a long-standing hallmark of Fourth Amendment jurisprudence. *See, e.g., Gerstein*, 420 U.S. 123-24 (recognizing "the desirability of flexibility and experimentation by the States' in pretrial procedures). The plaintiffs do not allege the police department had officers to spare on the evenings of their arrests, and they do not suggest what kind of reallocation the police should have made so the PPS could have had more officers on hand. Under such circumstances, the court will not second-guess the decision of the police department to staff the PPS the way it did. Therefore, after considering the police's explanation for and the circumstances behind the plaintiffs' detentions, the court holds the lengths were reasonable under the Fourth Amendment.

Finally, the defendants did not arrest and detain the plaintiffs in an extraordinary manner. "[T]he question whether a search or seizure is 'extraordinary' turns, above all else, on the manner in which the search or seizure is executed." *Atwater*, 532 U.S. at 354 (citing *Whren v.*

United States, 517 U.S. 806, 818 (1996)). An arrest and detention is not conducted in an extraordinary manner under the Fourth Amendment when the arrestee is subjected to nothing more than a normal custodial arrest. *Id.* In *Atwater,* the Court rejected the plaintiff's claim that her arrest and subsequent detention for failing to wear a seatbelt was so extraordinary as to violate the Fourth Amendment:

> [Plaintiff's] arrest was sure "humiliating," as she says in her brief, but it was no more 'harmful to . . . privacy or . . . physical interests' than the normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station, where officers asked her to remove her shoes, jewelry, and glasses, and to empty her pockets. They then took her photograph and placed her in a cell, alone, for about an hour, after which she was taken before a magistrate, and released on a $310 bond. The arrest and booking were inconvenient and embarrassing to [Plaintiff], but not so extraordinary as to violate the Fourth Amendment.

532 U.S. at 354-55.

The plaintiffs argue the defendants displayed a "shocking lack of all sense of proportion" when they handcuffed the plaintiffs behind their back, placed them in police vehicles for about an hour, allowed a Bradley Center employee to berate them, transported them to the city jail and thoroughly and extensively searched them, including a search in the crotch area, placing them in a holding cell with violent criminals, refused to let them make phone calls

during their detention (excepting plaintiff Heitz), issuing them citations, and releasing them after a detention of seven to ten hours in the early morning. Although the manner in which the plaintiffs were arrested and detained caused them discomfort and a certain level of anxiety, they fail to demonstrate they experienced anything other than the particulars of a normal custodial arrest. As such, the court concludes the plaintiffs were not arrested or detained in an extraordinary manner within the meaning of the Fourth Amendment.

In summary, the plaintiffs fail to demonstrate the actions of the defendants violated their constitutional rights. Accordingly, the defendants are entitled to dismissal of the plaintiffs' § 1983 claims on all counts. *See Heller*, 475 U.S. at 799 (a § 1983 action against a local government, such as the City of Milwaukee, requires a showing of a constitutional deprivation); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983) (a § 1983 action against an individual in his supervisory capacity, such as Chief Jones, requires a showing of direct responsibility for a constitutional deprivation); *Hampton v. Hanrahan*, 600 F.2d 600, 622 (7th Cir. 1979) (a § 1983 action for conspiracy requires a showing of a constitutional deprivation).

Accordingly,

IT IS ORDERED that the motion for summary judgment files on behalf of the City of Milwaukee, Chief Arthur Jones, and the City of Milwaukee Police Department be and the same is hereby **GRANTED**; and

IT IS FURTHER ORDERED that the plaintiffs' claims against the City of Milwaukee, Chief Arthur Jones,

and the City of Milwaukee Police Department be and the same are hereby **DISMISSED** with prejudice.

The clerk is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 14th day of January, 2003.

BY THE COURT:

/s/ J. P. Stadtmueller
U.S. District Judge